APPEAL NO. 93411

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1993). On April 19, 1993, a hearing upon remand was held in (city), Texas, with (hearing officer) presiding, as called for by Texas Workers' Compensation Commission Appeal No. 93035, decided February 24, 1993. He determined that the impairment rating of zero percent provided by the designated doctor was not contrary to the great weight of other medical evidence. Appellant (claimant) asserts that the designated doctor did not test the claimant as called for in the second printing, dated February, 1989, Guides to the Evaluation of Permanent Impairment, third edition, published by the American Medical Association (AMA Guides), and that the reason given for not testing was inconsistent with the results obtained by the treating doctor. Respondent (carrier) replies that the designated doctor followed the AMA Guides.

DECISION

Finding that the decision and order of the hearing officer are not against the great weight and preponderance of the evidence, we affirm.

In Texas Workers' Compensation Commission Appeal No. 93095, decided February 24, 1993, the Appeals Panel affirmed the determination of the hearing officer that claimant reached maximum medical improvement (MMI) on October 15, 1992, the date proposed by the designated doctor. The hearing officer found that the impairment rating was two percent as found by the doctor who evaluated the claimant on behalf of the carrier, rather than zero percent, as found by the designated doctor. The Appeals Panel remanded for development of the medical evidence as to the impairment rating and for an explanation of why the designated doctor's impairment rating was not used, if applicable.

The claimant testified that very little time was spent by either the designated doctor or the doctor performing the evaluation on behalf of the carrier. More importantly, claimant also testified that certain testing in regard to range of motion of his surgically repaired hip was not done. The Appeals Panel has observed that the legislature, in specifying that presumptive weight be given to the opinion of the designated doctor in regard to MMI and impairment rating (unless the great weight of other medical evidence is to the contrary), did not impose any standard on the designated doctor's time spent with the claimant in order to qualify for the presumption. *See* Texas Workers' Compensation Commission Appeal No. 93031, decided February 25, 1993. The hearing officer does not have to assign weight to medical evidence based on the quantity of the evidence or time spent by the particular doctor; on the other hand, the adequacy of the evaluation, or of treatment provided to improve the condition of the claimant, are valid points in considerations of weight and credibility. As set forth in Article 8308-6.34(e) of the 1989 Act, the hearing officer is the sole judge of the weight and credibility of the evidence.

In response to the decision calling for remand, the hearing officer inquired of the

designated doctor by letter dated March 18, 1993, providing a copy of his request to each party. When the designated doctor replied by letter dated March 24, 1993, the hearing officer provided a copy of that doctor's reply to both parties.

The hearing officer asked the designated doctor if he had followed the third edition of the AMA Guide to the Evaluation of Permanent Impairment, second printing, February 1989, citing pages 60-64, in examining the claimant's hip. The designated doctor replied in the affirmative. He cited claimant's "very exaggerated pain response" which the designated doctor said made it "impossible" to do an accurate range of motion measurement.

Neither party provided any medical document or other evidence indicating that the designated doctor's report should be invalid in failing to carry out certain range of motion testing. The claimant did point out that the claimant's treating doctor, on a different date, could complete the range of motion testing of claimant; in addition, as stated, the claimant testified as to the limited testing done by the designated doctor. The claimant at the hearing on remand provided a TWCC Form 69 from his treating doctor, unsigned, calling for 12% impairment. The hearing officer then found, on remand, that the impairment rating of the designated doctor was not overcome by the great weight of other medical evidence and used that impairment rating in determining zero percent impairment. Since the hearing officer used the designated doctor's impairment rating, the first question asked on remand, to explain any choice of impairment that was not based on the designated doctor's opinion, is moot.

While the failure of a doctor to follow the AMA Guides can lead to a determination that the rating was invalid (*See* Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993), the evidence before the hearing officer attacking the credibility of the designated doctor's report is not so strong that the absence of a finding of invalidity is against the great weight and preponderance of the evidence. The opinion of the designated doctor that pain prevented an accurate range of motion measurement may be subject to contradiction, but such evidence was not forthcoming in this case. As the judge of the weight of the evidence, the hearing officer could also consider that the doctor who evaluated claimant on behalf of the carrier also found full range of motion of the claimant's hip and only assigned a two percent impairment of the whole body.

The designated doctor based his assessment of impairment on "x-rays and my 26 years as an orthopaedic surgeon;" while the x-rays may be observed by another physician, a doctor's experience is not considered as objective evidence which another doctor could also observe to evaluate the patient and arrive at a similar result. (*See* paragraph 2.0 of chapter 2 of the AMA Guides.) The designated doctor's answer to the hearing officer's questions can be viewed as raising another question since the AMA Guides pertaining to hip range of motion do not refer to pain as a basis for not testing. The evidence that was

provided in opposition to the designated doctor's opinion was not considered sufficient to render that doctor's report invalid or not entitled to the presumption set forth in Article 8308-4.26 of the 1989 Act. The decision in this regard was one for the hearing officer to make.

The hearing officer's decision that the designated doctor's impairment rating was entitled to the presumption set forth in Article 8308-4.26 is not against the great weight and preponderance of the evidence and is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge